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ABSTRACT

In December 1972 the Federal Communications Commission (FCC) denied a request of the black Congressmen of the Black Caucus (BC) that it order the television networks to make free prime time available for the BC to reply to social matters in the President's State of the Union message. The BC argued that they were entitled to time balance coverage given to the President, based upon; 1) The Constitution's requirement of a balance of separate powers; 2) the FCC's fairness doctrine; 3) the right to free speech; and 4) the public interest. The networks replied they were entitled to control controversial programing, that they presented opposing views, and that the fairness doctrine guaranteed presentation of opposing viewpoints, not the appearance of particular individuals. The FCC affirmed the network's discretionary powers, concurred that the fairness doctrine was issue-oriented and did not give access rights to individuals, and ruled that separation of powers did not imply free access to broadcast time for Congressmen. No ruling was made on the free speech issue since it was being argued in another case before the Supreme Court. (LB)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 72-1193
89544

In re Complaint of)
THE BLACK CAUCUS OF THE)
UNITED STATES HOUSE OF REPRESENTATIVES)
)
against)
)
American Broadcasting Companies, Inc.)
Columbia Broadcasting System, Inc.)
National Broadcasting Company, Inc.)

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1972 ; Released: **February 6, 1973**

By the Commission: Commissioners Johnson and Hooks dissenting and issuing statements; Commissioner H. Rex Lee concurring and issuing a statement.

1. The Commission has before it (1) the complaint and request for declaratory ruling by the Black Congressmen of the U.S. House of Representatives 1/ (Black Caucus), filed on February 1, 1972; (2) comments in opposition by the American Broadcasting Companies, Inc. (ABC), the Columbia Broadcasting System, Inc. (CBS), and the National Broadcasting Company, Inc. (NBC), dated March 20, 1972; (3) the Black Caucus' reply to the oppositions of ABC, CBS, and NBC filed on April 20, 1972, and (4) comments of the National Committee for a Effective Congress in support of the Black Caucus' petition, filed on May 15, 1972.

SUMMARY OF PLEADINGS

2. The Black Caucus (hereinafter petitioners) requests that the Commission direct the three national television networks to make available to them a free half - or full - hour of prime evening time to respond to the President's 1971 State of the Union message so that they can present their views on racial and other important issues. President Nixon delivered his 1971 State of the Union Address to a joint Session of Congress on January 22, 1971, at 9:00 p.m. E.S.T. The Presidential message was broadcast live by the three major national television networks (ABC, CBS and NBC).

1/ The Black Congressmen of the U.S. House of Representatives are also known and organized under the name of "Black Caucus." The Black Caucus members filing this complaint are the following thirteen members of the United States House of Representatives: Hon. William L. Clay (Missouri), Hon. Shirley Chisholm (New York), Hon. George W. Collins (Illinois), Hon. John J. Conyers, Jr. (Michigan), Hon. Ronald V. Dellums (California), Hon. Charles C. Diggs, Jr. (Michigan), Hon. Walter E. Fauntroy (District of Columbia), Hon. Augustus F. Hawkins (California), Hon, Ralph H. Metcalfe (Illinois), Hon. Parren J. Mitchell (Maryland), Hon. Robert N. C. Nix (Pennsylvania), Hon. Charles B. Rangle (New York), and Hon. Louis Stokes (Ohio).

Petitioners contend that "Although the President chose to discuss a number of important and controversial issues, he remained notably silent on the serious national problem of institutional racism against black and other minority Americans." Petitioners state that they are uniquely qualified to speak on the issue of racial problems in that they represent approximately 3,400,000 black Americans; that they won their seats by large voting margins; and that they comprise all of the black Congressmen in the House of Representatives.

3. Petitioners state that they requested the three national television networks to accept and broadcast a pre-taped or filmed documentary over which they would exercise complete control of content and format, but were refused that opportunity due to network policies which exclude all documentaries and other programming which discusses controversial issues and which is not produced and controlled by the network. 2/

2/ Petitioners wrote the three major television networks on January 22, February 16, and May 3, 1971 and requested free time to reply to the President's January 22, 1971 State of the Union message. Congressman William L. Clay, on behalf of his black colleagues in the United States House of Representatives, wrote the three networks on January 22 and requested reply time to present the views of the Black Caucus on the "State of Affairs" of black Americans. Mr. Clay stated: "On the basis of the Fairness Doctrine as outlined by the Federal Communications Commission, we request equal and comparable time . . . " ABC, CBS, and NBC refused his request on the basis that they had already broadcast contrasting points of view to those expressed by President Nixon in his State of the Union message. ABC stated that on January 27, 1971 it presented a special one-hour reply to the President, featuring Senate Majority Leader Mike Mansfield. CBS, according to petitioners, claimed that its offer of time to the Democratic Party exhausted its obligation to provide reply time and that issues raised by the Black Caucus would be covered in CBS news and information programs. NBC stated that it had broadcast contrasting views to the President in NBC news, interview, panel discussion and special programs.

On February 16, 1971 petitioners again sent letters to the three national networks requesting time. This request included the argument that Congressmen should have a limited but significant right of access to network programming, and that this right of access should accrue to them "even if the President had never delivered his State of the Union address." Petitioners based their request for direct access on the First Amendment and the separation of powers concept in the U.S. Constitution. The networks again refused petitioners' request for time.

Petitioners on May 3, 1971, following meetings with CBS and ABC, wrote to the networks and requested that they broadcast a program "produced and supplied to the network by the Black Caucus, which would devote itself to the

(continued on next page)

Petitioners claim that:

> they could not adequately perform their representative function as elected Congressmen of the United States unless they were allowed to speak periodically and directly to their constituents and all citizens of the country, in their own words free of network editorial supervision.

Petitioners therefore ask that the Commission:

(1) Rule that the three television networks' policies of categorically barring access to the facilities they control for programming produced by members of Congress, addressed to important and current national issues of the day, is fundamentally arbitrary, irrational, and unsupportive of the "public interest," contrary to the "separation of powers" doctrine in Articles I and II of the Constitution, contradicted by the fairness doctrine obligations in the Communications Act of 1934, and violative of the basic freedoms of expression in the First Amendment;

(2) Issue a declaratory ruling that the three national television networks must make available an appropriate number of prime time hours each year, generally comparable in amount to the time given members of the Executive Branch, for direct unfiltered political speech under

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2/ problems of racial minorities in this country." ABC and CBS again refused this request. ABC, in a letter dated May 21, 1971, stated that " . . . ABC will not accept documentary programs dealing with controversial issues which are not subject to the editorial supervision and control of ABC News." In a May 20, 1971 letter, CBS stated that broadcasts dealing with current controversial issues will be produced under the direction and control of CBS News. NBC stated that "NBC News produces a weekly half-hour series called 'Comment' . . . The format of the program provides for 'direct and unfiltered speech . . .'" NBC suggested that the "Comment" program could be used to present the views of the Black Caucus. However petitioners interpreted this reply to be a rejection of their request, in that the "Comment" program is produced and controlled by NBC in most respects.

the exclusive control of elected representatives of the Congress, including Senators and members of the House of Representatives, and should fairly apportion that access time among leading spokesmen or groups of spokesmen on current issues of national importance; and

(3) Order the three national television networks either to make available to complainants a half-hour or full-hour of network programming time, free of charge, to present a message of their own choosing, on racial and other issues, or to show cause why complainants are not the appropriate Congressmen to speak directly to the nation on a topic over which they exercise complete content control, and in a format of their own choosing.

4. Petitioners state that television networks do not have to accept all requests by Congressmen for air time, but contend that networks should not be allowed to extend to the President unconditional prime time access while allegedly categorically rejecting all such requests for time by Congressmen on the basis of a policy that rejects programming not initiated and controlled by the networks.

5. Petitioners base their complaint and request for declaratory ruling on (1) the separation of powers concept in Articles I and II of the Constitution, (2) the fairness doctrine and (3) various First Amendment arguments. Regarding separation of powers, petitioners contend that the networks have impaired the power of Congress to function as an equal and coordinate branch of government by giving the President a right of access whenever he chooses to address the electorate but denying members of Congress the same opportunity. Petitioners state that the inability of Congressmen to converse with their national constituency has destroyed the "delicate balance" of power created by Articles I and II of the Constitution and has diminished the power of the legislative branch to such a degree that it may be unable to "check and balance" the power of the President. Petitioners quote from Senator Fulbright's testimony before the Subcommittee on Communications of the Senate Committee on Commerce, 91st Cong., 2nd Sess., Aug. 4, 1970:

> Communications is power and exclusive access to it is a dangerous, unchecked power . . . As matters now stand, the President's power to use television in the service of his policies and opinions has done as much to expand the powers of his office as would a constitutional amendment formally abolishing the co-equality of the three branches of government.

6. Petitioners also interpret Article I, Section 5, Clause 3 of the Constitution, which requires each House of Congress to keep a permanent journal of its proceedings, as suggesting "that the Framers imposed a constitutional duty on the Congress to communicate with its electorate." Petitioners assert that a policy denying them access to the media prevents them from fulfilling their Constitutional duty to communicate with their constituency. Petitioners conclude that the Constitutional requirement for open communications between Congress and its constituency can be fulfilled only by granting Congressmen periodic, direct access to the facilities of network television.

7. Petitioners also contend that the fairness doctrine requires a limited right of Congressional access to the broadcast media. Petitioners state that the fairness doctrine requires licensees affirmatively to cover controversial issues of public importance, and that the doctrine provides more than a mere right of rebuttal to a licensee's own editorial speech. Petitioners cite the Commission's 1949 Editorializing Report, 13 F.C.C. 1246 (1949), as imposing on licensees an affirmative duty to seek out concerned spokesmen on new and important issues and give them the opportunity to initiate debate, over and beyond their obligation to make available on demand an opportunity for the expression of opposing views. Petitioners contend that licensees should, in part, serve as moderators between competing spokesmen on important issues, and not merely present all viewpoints themselves. Petitioners state that a licensee would fulfill its fairness obligations by making an appropriate number of opportunities available for self-initiated and produced programs and by preserving a rough balance between the self-initiated views of the speakers. Petitioners assert that, in the case of the President, licensees are obligated by the fairness doctrine to cover some speech which he initiates. Therefore, petitioners conclude, licensees must afford a comparable opportunity for self-initiated speech by members of Congress. Petitioners state that licensees do not have complete control over access and have been required to provide direct personal access under the fairness doctrine or one of its corollaries 3/ to specific individuals who then have substantial control over the content and format of the presentation.

8. Petitioners argue that the First Amendment guarantees them a limited free right of access to network television to communicate their message in any mode or format they choose. Petitioners contend that the networks have created a national forum for communication and, once having opened it to the President and themselves, cannot arbitrarily and selectively close it to Congressmen. Petitioners state that the First Amendment prohibits governmental action "abridging the freedom of speech"; that political speech is involved in this controversy; and that the "documentary" mode of speech is

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3/ See Section 315 of the Communications Act of 1934, as amended, Section 73.123 of the Commission's Rules, and Nicholas Zapple, 23 F.C.C. 2d 707 (1970).

often considered the most effective form of television and is entitled to full First Amendment protection. They contend that petitioners' speech is being abridged by a network policy which prohibits them from broadcasting any program dealing with a controversial issue of public importance which is not produced and controlled by the networks. Petitioners state that Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) and Business Executives Move for Vietnam Peace v. F.C.C., 4/ ___ U.S. App. D.C. ___, ___ 450 F. 2d 642 (1970), cert. granted ___ U.S. ___ (1972), stand for the idea that the actions of broadcast licensees are so impregnated with government character as to become subject to the Constitutional limitations placed upon state action. Petitioners state that First Amendment analysis of "access" to a speech forum is generally conducted by balancing the interests of speakers in reaching an audience through the forum in question, against the importance of other speech and non-speech forum uses, and the extent to which they may be disruptive. Therefore, petitioners conclude that any policy initiated by an institution imbued with governmental character, which prohibits all outside produced programs dealing with controversial issues, must be voided, absent some strong national policy or compelling interests which would justify it.

9. With respect to balancing the interests in the present case, petitioners contend that the three national networks have available 3,834 prime time hours per year and that relinquishing a small fraction of such time would not significantly impair or disrupt respondents' normal operations. Petitioners argue that political speech is worthy of the highest First Amendment protection. Petitioners also stated that they have a strong interest in communicating their views to the electorate. Petitioners argue that restricting petitioners to short news clips, interviews or political debates does not provide them with an adequate opportunity to express their views. Petitioners acknowledge the broadcasters' First Amendment interest in the news and documentary programs they produce, but state that most network programming is produced without the supervision and control of the networks and that the networks perform more of an "allocative" than a "speech" function in choosing between programming drawn from independent or outside sources. Petitioners state that the limited right of access will not subject the networks to significant disruptive burdens. Petitioners contend, therefore, that their interest in being given a limited right of access outweighs any competing interest of the broadcaster in that same time.

4/ Petitioners note that the Court in BEM delineated three First Amendment rights of the public which attach to the broadcast forum; (1) the public has an important right to receive a full range of ideas and information on important and controversial subjects, (2) the public's interest in the mode or manner--as well as the content--of public debate aired on the broadcast media, and (3) the interest of individuals and groups in effective self-expression.

10. ABC and CBS rejected petitioners' request for free time to broadcast a documentary initiated and produced by themselves on the basis of their stated policy against the broadcast of any program dealing with a controversial issue which is not produced or controlled by the network itself. 5/ NBC, while also refusing to grant petitioners' request, based its refusal on the fact that it already had presented contrasting views on the topics the petitioners wished to discuss. NBC did not base its rejection on any stated policy against the broadcast of documentary programming which is not produced or controlled by NBC. NBC stated:

> In fact, NBC did not take the position that its facilities were barred to programming produced by members of Congress, and . . . attached correspondence bears this out. NBC has presented a number of programs over the years, on both a paid and sustaining basis, in which members of Congress were given access to NBC facilities to present programming, the substantive content of which was "produced" by members of Congress. In fact, at NBC's invitation, members of the Black Caucus participated in a program in which NBC's production and control was limited to furnishing the studio equipment, production personnel and identifying the speakers -- in effect the substantive content was "produced" by the participants.

NBC further stated:

> That the First Amendment applies to broadcasting is not in dispute. Nor do we dispute that it protects the complainants' right of free speech. There is no question that complainants may exercise this right in a program, documentary or otherwise, which they themselves produce and distribute to interested broadcast stations and CATV systems.

Petitioners did not view the NBC answer as responsive to their request for free time to broadcast a documentary produced by them and concluded that "It remains unclear, therefore, whether NBC rejected complainants' request on policy grounds, or on the merits of their specific request."

11. All three networks in their March 20, 1972 reply state that the petitioners' request for a right of Congressional access should be denied by the Commission. On grounds other than the fact that the broadcasts would

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5/ See footnote 2.

be produced by the petitioners, the three networks note that petitioners did not allege that the networks violated the fairness doctrine by failing in their overall programming to present opposing views to the President's State of the Union message. The networks state that the exceptions to licensee discretion in selecting spokesmen are specifically prescribed in the Commission's Rules and Section 315 of the Communications Act and that the networks need not give any specific group or individual "access" unless it falls within one of these exceptions. Regarding the separation of powers argument, the networks state that petitioners failed to cite any reference to the Constitution, applicable statutes, regulation or case law supporting their contention that the Constitutional concept of separation of powers requires a right of access to television. The networks reject petitioners' argument that the Constitutional requirement for Congress to keep a journal should be interpreted to mean that Congressmen have a constitutional directive to communicate on the broadcast media to their electorate. The networks state that the journal requirement is really a requirement that Congress record its activities, not a directive to communicate in the media.

12. The networks state that petitioners' contention that the fairness doctrine requires Congressional access is inconsistent with both the Commission's and the court's interpretations of communications law, and that the fairness doctrine should not be reconstructed so as to transform its focus from an issue-oriented to a spokesmen-oriented doctrine. The networks state that a similar right of access was rejected by the court in Democratic National Committee v. CBS, Inc., ___ U.S. App. D.C. ___, ___ F. 2d ___ (decided February 2, 1972, Case Nos. 71-1637 and 71-1723) (hereinafter DNC). The networks state that the Commission has consistently held that licensees must have sufficient control as to format, spokesmen and scheduling in order to insure that the public is adequately informed. The networks also reject petitioners' First Amendment arguments, stating that the Amendment should not be used as a weapon to carve out a personal right of access of Congressmen. The networks claim that petitioners' right of access would hinder rather than foster public debate and therefore it would become increasingly difficult for the networks to further the First Amendment goal of preserving an uninhibited marketplace of ideas. The networks also reject petitioners' use of BEM, supra., to uphold their Constitutional arguments. The networks contend that BEM dealt only with time relinquished by broadcasters to others (i.e., commercial time), in which broadcasters have no strong First Amendment rights. The networks contend that since licensees do not as a regular practice relinquish any program time to outsiders and there is a strong First Amendment interest of broadcasters in non-commercial speech, BEM does not apply to this case.

13. Petitioners, in reply to the opposition of the three networks, contend that a Congressional right of access to the media will not create unworkable administrative burdens. Petitioners state that the networks have the skill and expertise to determine what Congressmen and what points of view should be broadcast. Petitioners note that the networks have always

made such judgments in determining what to cover and who should appear on their network news interview programs. Petitioners argue that their request will not be an intrusion on the traditional journalistic role of the broadcaster, in that the licensee still will be able to exercise discretion concerning what stories to cover and what spokesmen to broadcast. Petitioners assert that the documentary is one of the best techniques for educating the mass television audience and that the networks have failed to state why they find it important and necessary to broadcast only documentaries produced and controlled by themselves. Further, petitioners state that the DNC decision which the networks relied upon to argue that the fairness doctrine does not require Congressional access is inapplicable to the present proceeding. Petitioners also state that their request would not interfere with network control over their own documentary programming. Petitioners conclude "that, at most, members of the public would be exposed to additional programming -- programming not subject to the editorial supervision and control of the networks."

14. The National Committee for an Effective Congress (NCEC) submitted comments to the Commission on May 15, 1972 in support of petitioners' request for a Congressional right of access to the media. NCEC states that the "powerful medium of television has increasingly become the sole preserve of the Executive Branch for the promulgation and defense of its policies." NCEC contends that if Congressmen are not given the opportunity to utilize television, ". . .a dangerous imbalance in communications power will exist, which will increasingly distort the functioning of a system based on 'separate but equal' branches of government." NCEC states that the "Speech and Debate Clause" 6/ and the requirement that Congress maintain a journal indicate that Congress has a duty to communicate its view to the people. NCEC states that the language of the Constitution of necessity must be read to reflect the technological developments of the 20th century. NCEC concludes that if the President is given a right of access to communicate to the people whenever he wishes, the spirit and intent of the Constitution require that the same privilege be afforded members of Congress.

DISCUSSION

15. We shall consider initially petitioners' contention that the fairness doctrine requires a limited right of Congressional access to the broadcast media. (See paragraph 7 for petitioners' arguments.) Petitioners do not state that the networks have failed to fulfill their fairness responsibilities regarding racial issues in the United States; rather they argue that they as a group should have specific access to discuss the matters over and beyond any network's fairness doctrine obligation to present contrasting views on controversial issues. Petitioners assert that just as

6/ Article I, Section 6, Clause I of the United States Constitution states in part that Senators and Representatives ". . .for any speech and debate in either House, . . .shall not be questioned in any other place."

the networks cover some of the President's self-initiated speech, so must they afford a comparable opportunity for self-initiated speech by members of Congress.

16. The broadcast system which Congress established has been fully described in such landmark decisions as National Broadcasting Company v. U.S., 319 U.S. 190 (1943) and Red Lion Broadcasting Co. Inc. v. F.C.C., supra. This system was based upon the unique nature of radio, in that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." NBC v. U.S., supra at 226. Congress created a system of licensing private entities for short terms, and made it incumbent upon them to operate their facilities in the public interest. As the court stated in Red Lion, supra, at p. 394, licensees are ". . .given the privilege of using scarce radio frequencies as proxies for the entire community, [and are] obligated to give suitable time and attention to matters of great public concern."

17. The Commission has consistently stated that, with some exceptions not applicable to this case, the licensee has discretion in discharging his public interest obligation. The Commission in its Editorializing Report stated:

> "It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests of time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. . . ."

That policy has been reiterated in the Commission's 1964 Fairness Primer, 29 Fed. Reg. 10415, 10416, and its 1960 Programming Statement, 25 Fed. Reg. 7291 (1960). As we stated in In re Democratic National Committee, 25 F.C.C. 2d 216 (1970):

> In line with these general precepts we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.

18. It is clear that the fairness doctrine is issue-oriented. The Supreme Court in Red Lion, supra, has stressed the right of the public to be informed -- not the right of the broadcaster or any individual or group to speak over broadcast facilities. The Commission has consistently rejected the claims of groups and individuals requesting a specific right of access to broadcast facilities. In re Committee for Fair Broadcasting, et al, 25 F.C.C. 2d 283 (1970), and The Committee of One Million, 33 F.C.C. 2d 545 (1971). Only in a few well-defined situations do particular individuals or groups have the right to use a licensee's broadcast facility. 7/ As indicated above, the fairness doctrine gives licensees wide discretion in selecting what issues to broadcast and what spokesmen to present. As we stated in The Committee of One Million at p. 548:

> The Commission's consistent policy, now under review, has been that licensees must have adequate control to insure that the public will be reasonably informed, and that the assertion of a right of access is incompatible with the overriding right of the public to hear all substantial sides of an issue, particularly in view of the licensee's duty to present an opposing viewpoint without charge if that is necessary to insure that a conflicting viewpoint is not denied a hearing. We read Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), as being consistent with our position and, indeed, as rejecting a personal right of access.

In this regard, the Commission in Matter of Complaint of the Senate of the Commonwealth of Puerto Rico, ___ F.C.C. 2d ___ (decided October 12, 1972) 8/ and In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, First Report in Docket 19260, FCC 72-534, June 22, 1972, ___ F.C.C. 2d ___, has rejected all arguments that the fairness doctrine be extended to require a licensee to provide a comparable opportunity for opposing spokesmen to comment on the issues raised in a broadcast appearance of any public official, including the President. Thus, we reject petitioners' contention that the fairness doctrine requires a right of Congressional access to the broadcast media.

19. In addition to the fairness doctrine, petitioners rely in their complaint on the separation of powers concept of Articles I and II of the Constitution, contending that the networks have impaired the power of Congress to act as an equal and coordinate branch of government by giving the President free access while denying members of Congress the same opportunity. They state that the actions of the networks have diminished the power of the legislative branch to such a degree that it may be unable to "check and

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7/ See Section 315 of the Communications Act of 1934, as amended, regarding "equal opportunities"; the personal attack and political editorial section of the Commission's Rules (Section 73.123); and Nicholas Zapple, 23 F.C.C. 2d 707 (1970).

8/ See paragraph 7 of the Commission's decision.

balance" the President. Petitioners further assert that a policy that denies them access to the media prevents them from fulfilling their constitutional duty to communicate with their constituency -- a duty they infer from the requirement of Article I, Section 5, Clause 3, that each House of Congress keep a permanent journal of its proceedings.

20. However, the constitutional concept of separation of powers does not, in our opinion, justify the conclusion that the Constitution requires a right of special access to broadcast media for members of Congress. The Constitution does not command such communication, and the Constitutional prerogatives and powers of Congress remain intact without it. Nor do we believe that the requirement that a journal be kept justifies a conclusion that a constitutional mandate exists for the allocation of nationwide radio or television time to members of Congress. Although we agree that the broadcast media are essential to proper communication with the public, we find nothing in the pleadings before us to justify the novel interpretation of the Constitution here advanced. We note in this regard that the Court of Appeals, in rejecting the Democratic National Committee's request for a right of reply to Presidential addresses, Democratic National Committee et al v. FCC, 460 F. 2d 891, 905 (D.C. Cir. 1972), stated

> We are not unsympathetic to the plight of the party out of the White House but sympathy cannot be allowed to deter the public from the maximum information it can obtain. One of the primary sources for public information concerning the national and its welfare is from the Presidential broadcast. While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond in the opposition party.

21. Petitioners also argue that the First Amendment guarantees them a limited free right of access to network television to communicate their message in any mode or format they choose. In Business Executives' Move for Vietnam Peace, 25 FCC 2d 242 (1970), the Commission was asked to decide whether a licensee's flat ban against accepting paid commercial

announcements which contained a discussion of a controversial issue was against the public interest and violated the First Amendment. The Commission held that stations were not obligated to sell time to the complaining group (BEM) to present paid commercial announcements against the United States policy in Vietnam; that a flat ban policy against accepting paid commercial announcements did not per se violate the fairness doctrine or any other Commission policy; that Red Lion Broadcasting Co., Inc. v. F.C.C., supra, did not support BEM's contention that a flat ban violated the First Amendment rights of BEM's spokesman; that the licensee had furnished suitable access to the public on the ideas which BEM wished to express; and that a licensee is not a common carrier and need not sell or give time to everyone seeking it. At the same time that BEM reached the Commission, the Democratic National Committee (DNC) sought a declaratory ruling to the effect that a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for comment on public issues and for solicitation of funds. The Commission in Democratic National Committee, 25 FCC 2d 216 (1970) held that licensees need not sell time to any individual or group for comment on public issues, because no particular individual or group has a right to express its particular views by means of a broadcast facility.

22. The BEM and DNC decisions were appealed and the Court of Appeals considered both cases together. The Court did not consider the solicitation of funds aspect of the DNC complaint. The Court reversed the Commission in BEM and DNC in Business Executives' Move for Vietnam Peace v. F.C.C., 450 F. 2d 642 (D.C. Cir. 1971), and held that:

> . . .a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners or, for that matter, of any other particular applicant for air time must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

23. However, on February 28, 1972, the Supreme Court granted the Commission certiorari and also stayed the mandate of the Court of Appeals in BEM, 450 U.S. 953 (1972). In view of the fact that the issue of a First Amendment right of access is now pending before the Supreme Court, we will not re-examine that issue here.

24. Aside from their assertion of a right of access, petitioners argue that the networks' policy of excluding controversial issue programming produced by others is contrary to the public interest. This is one of the many questions which will be considered by the Commission in its current inquiry In the Handling of Public Issues Under the Fairness Doctrine, etc., supra, and we believe that it may be more appropriately considered in the context of that inquiry than on an ad hoc basis in this case.

25. While the Commission recognizes the potential of television to influence public opinion and the advantages a President traditionally has in gaining access to the broadcast media, to attempt to carve out a special right of access for either Congressmen or the President would be contrary to the communications system established by Congress and to all Commission precedent, and adoption of such a requirement would go far toward making licensees act as common carriers, which is contrary to congressional intent. See Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. 153(h). See discussion, par. 16. Again, one of the most fundamental principles of broadcast law is that ideas, rather than any person or group, must be given access to the broadcast media. If Congress, however, decides that the public interest requires it to establish a specific right of access for Congressmen, it may of course, do so by statute. In fact, a proposal for direct Congressional access to broadcast facilities was initiated by Senator William J. Fulbright during the 91st Congress, but expired in the Senate Subcommittee on Communications upon the adjournment of the 91st Congress. Senator Fulbright's Senate Joint Resolution 209 proposed that Section 315 of the Communications Act of 1934, 47 U.S.C. §315 (1964) be amended by the addition of the following subsection:

> (d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year.

26. Accordingly, and for the reasons set forth above, we find that no action by the Commission is warranted at this time, and the complaint of the Black Caucus IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

* See attached statement of Commissioner Hooks.
Statements of Commissioners Johnson and H. Rex Lee to be released at a later date.

In re: COMPLAINT OF THE BLACK CAUCUS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Dissenting Statement of Commissioner Benjamin L. Hooks

The three American television networks, ABC, CBS and NBC, have refused to honor a request, presented to them by the Black Caucus of the United States House of Representatives (hereinafter, "Black Caucus") for time in which to present their views, and indeed the views of their unique constituency, the Black American populace, on one of the most urgent issues besetting this country--the race issue. This refusal has, unfortunately, reaffirmed one thought that permeates the minds of many Black folks, i. e., that the system is diametrically opposed to anything which can be categorized as Black-oriented.

Through their programming, the networks--and hence the individual stations--daily inundate the public with their selective choice of spokesmen to expostulate on the multiple aspects of "the racial issue."

The Black Caucus request serves to highlight perfectly the principal point I have been reiterating in speeches and discussions ever since accepting appointment as Commissioner; namely, that while the individual licensees generally do a creditable and commendable job of programming, and the networks provide us with frequently superb coverage of events in inimitable fashion, the public is mostly deprived of the opportunity to hear and see Blacks (and Blacks' viewpoints) at variance with media-reinforced stereotypes of Black citizens.

It is presumptuous on the part of white media executives and news editors--particularly in view of the fact that the establishment broadcast hierarchy is virtually devoid of Blacks in any meaningful roles in editorial and programming decisions--to believe that they can better convey to the public black views on controverial issues than can the Black Caucus. Illustrative of this unseemly hauteur are the responses of ABC and CBS to the Black Caucus. The president of ABC declaimed:

> We believe that our professional news organization is more objective and has the responsibility and competence to devise the programming to accomplish this end, including the selection of appropriate format and spokesmen. (Emphasis supplied)

CBS similarly rejected the notion that the Black Caucus might more proficiently disseminate Black political viewpoints than it by asserting:

> It has been our policy for many years--that broadcasts dealing with current controversial issues will be produced under the direction and control of CBS News. . . .

Inasmuch as the Black Caucus complaint is also grounded in the Fairness Doctrine--which seeks antagonistic viewpoints--ABC's claim of objectivity is clearly inapposite. Objectivity is nearly antithetical to the purpose of affording a Fairness Doctrine (discussed infra) response and certainly irrelevant to the thrust of the Black Caucus request.

Therefore, the out-of-hand refusal on the part of the networks to provide a platform--a platform the Black Caucus could not duplicate short of purchasing broadcast facilities themselves--by which the American public could receive invaluable information, as I have said

before, cannot but reinforce in the minds of some Black citizens that there still exists an insidious effort to squash the Black upward movement. In my mind, the unwarranted refusal to the Black Caucus raises suspicions about the bona fides of the broadcasters in either defusing race problems (riots on aircraft carriers make good, exciting copy) or in offering the public the best possible information. That is my, shall we say, emotional dissent.

From a legal standpoint the networks' refusal to the Black Caucus is a clear violation of virtually every public interest standard embodied in the Communications Act and the Commission's various program policies. We procede from the bedrock premise that broadcasters are licensed to serve the public interest [1] as trustees of the communal radio spectrum. [2] Pursuant to their statutory obligations, and putting aside Fairness Doctrine [3] questions momentarily, a licensee must heed the following Commission admonition:

> If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them; it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for expression of opposing views. (Emphasis supplied). Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251 (1949).

The 1949 Editorializing Report language hereinabove cited dispels any doubt that the broadcaster has an independent obligation to furnish the public with useful and stimulating programs so as to encourage "uninhibited wide-open" [4] debate on public issues. In terms of serving the public interest, that tenet is the keystone.

In the face of such premonishment, how then can a broadcaster refuse to transmit to the public--increasingly dependent on television for information--the important positions of the premier conclave of Black political thought on racial issues? Licensees, as public trustees or good journalists or whatever, have a compelling duty to elicit such views when available. Here, though available on a silver platter to a public with a First Amendment right to be informed of all views on controversial issues of public importance, [5] the networks have arbitrarily withheld such information from the American public on the fallacious (and supercilious) ground that they must edit and control what the public hears about controversial issues.

That licensees cannot serve the public interest while at the same time excluding the citizenry from exposure to the unadulterated views of the President and other important government officials is implicit in the 1949 Editorializing Report, supra, wherein we said:

* * *

> This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to

> the discussion and consideration of public issues has been affirmed by this Commission in a long series of decisions.
>
> * * *
>
> And the Commission has made clear that in such presentation of news and comments, the publi interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise.
>
> * * *
>
> These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the public. (Id. at 1247, 1249 and 1250). 6/

The Black Caucus occupies a distinct role for which there is no comparable partisan or non-partisan amalgam and should receive coverage. Because of their individual and widely-diverse backgrounds, they have welded together a composite view, if indeed such view collectively exists, of the needs and aspirations of a multiplicity of constituencies within the Black national community. It has fused, consolidated and condensed positions which bespeak of all black interests. The Black public--and perhaps more importantly, the white public--should be permitted to see the Black Caucus, in popular parlance, "do its thing" in a way that no pale imitation from the best-intentioned broadcaster can approximate. To categorically, and self-righteously, deny a paltry few prime time hours out of the hundreds annually available for the discussion of one of the nation's critical problems

from the representatives of the group most concerned--the Black electorate--is more than prima facie inconsistent with the public interest.

Turning to the Fairness Doctrine [7] aspect of the Black Caucus complaint, let me say that I fully recognize that in light of its limited nature, the spectrum cannot be made available to all who wish to use it. National Broadcasting Co. v. F. C. C., 319 U. S. 190(1943). I also understand that the Fairness Doctrine is issue oriented and cannot require an identical treatment of all differing views because, as Judge Wilkey stated in Green v. F. C. C., 144 U. S. App. D. C. 353, 358, 447 F.2d 323, 328 (1971) "this would place an unreasonable burden on the licensee" and that "licensees may exercise their judgment as to what material is presented and by whom." [8] Moreover, in the exercise of this judgment, we have succinctly held:

> The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Letter to Mid-Florida Television Corp., 40 F. C. C. 620, 621 (1964).

The issues in the instant Fairness complaint are thus sharply drawn: (1) In response to the Chief Executive's unedited, carefully prepared views on controversial racial issues of public importance, did the networks act unreasonably in denying a response from the Black cadre of the Legislative Branch? (2) Can the networks be said to have acted

reasonably and in good faith in denying time for contrasting views to the most appropriate spokesmen? 9/

As the court stated in Columbia Broadcasting Co. v. F. C. C., supra, f.n. 7, supra, 147 U. S. App. D. C. at 191, 454 F.2d at 1034:

> The public must be equipped to make hard choices between competing political philosophies. This end is best served where there is robust debate among the people most directly involved--the spokesmen themselves--not where the operator of a federally licensed facility must circumscribe the debate as a condition precedent to airing it at all.

For the networks to maintain that some other scattergun approach can fairly match the concerted impact of the State of the Union address with the near effect of the compacted vehicle offered by the Black Caucus is a patently unreasonable violation of the clear meaning of the Fairness Doctrine. The principle that individual proponents, on isolated broadcasts, cannot match the clout of a concerted rebuttal has been acknowledged often by the Commission. 10/ But the combined views of the Black populace, as personified in the membership of Black Caucus, is a far cry from the individual views on isolated issues presented to the public by persons they (broadcasters) have caused to be anointed and crowned "Black leaders." I can no more accept the fact that the media-crowned Black leaders speak for the total Black populace than I can accept as fact that a Ku Klux Klansman, college radical, or establishment-type figure can speak individually for the entire white population. Just as political broadcasts on partisan issues by one political party are

appropriate for response by the other(s) [11] the Black Caucus, as the major elected voice of the Black community to the Legislative Branch of the government--is the obvious entity to proffer positions on important racial issues and their proper resolution in contradistinction to those views and solutions held by the Executive. The public must hear both; that is the crux of the Fairness Doctrine.

The networks cannot claim that the Black Caucus is demanding time for a cacophony of differing voices which the networks, given temporal limitations, could not accommodate. The Black Caucus has made it simple for the networks. It has consolidated the myriad positions of the nation's Black citizens into a neat package. The appropriateness of the face-off is manifest and the networks, whatever discretionary latitude is accorded them in establishing standards, cannot claim that it can offer better format or spokesmen for the ideological exchange.

By steadfastly clinging to an unyielding discretion in programming choices--even where the Fairness Doctrine limits this discretion--and misapplying their understandable zeal to resist governmental efforts to encroach on programming choices, the networks have, in the balance, come down on the wrong side of the Fairness Doctrine and the public interest. [12]

FOOTNOTES

1/ 47 U.S. C. Sections 307, 309.

2/ Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

3/ See f.n. 9, infra.

4/ Red Lion Broadcasting Co. v. F.C.C., supra, at 390, (citing New York Times Co. v. Sullivan, 376 U.S. 254, 290 (1964).

5/ Id. Moreover, in connection with this Constitutional right, it is impossible to square the following Red Lion language with the network positions set forth in their responses.

> . . . That the right of free speech of a broadcasters . . . does not embrace a right to snuff out the free speech of others . . . [A] licensee has no constitutional right . . . to monopolize a radio frequency to the exclusion of his fellow citizens . . .. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . Red Lion, supra, f.n. 3, at 387, 389, 390.

6/ See, Democratic National Committee, _____F.C.C. 2d _____, 22 R.R. 2d 727 (1971); aff'd, sub. nom., Democratic National Committee et. al v. F.C.C., ____ U.S. App. D. C. _____, ____ 460 F. 2d 891, 905 (D.C. Cir. 1972), wherein the Court of Appeals said:

> One of the primary sources of public information concerning the nation and its welfare is from the Presidential broadcast. While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer, it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is, he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and as this obligation exists for the good of the nation . . . .

But see, Columbia Broadcasting Co. v. F.C.C., 147 U.S. App. D.C. 175, 177, 454 F.2d 1018, 1020 (D.C. Cir. 1971) wherein the Court of Appeals noted:

> . . . [I]n the distallation of an informed public opinion, such [Presidential] appearances play a very basic role. But if the words and views of the President become a monolithic force, if

FOOTNOTES (Continued)

6/ Continued

> they constitute not just the most powerful voice in the land but the only voice then the delicate mechanism through which an enlightened public opinion is distilled, far from being strengthened, is thrown dangerously off balance. Public opinion becomes not informed and enlightened, but instructed and dominated.

7/ The Commission's Fairness Doctrine, skeletally framed, requires a broadcaster to afford a reasonable opportunity to qualified spokesmen to present contrasting viewpoints on controversial issues of public importance. See, 47 U.S.C. Section 315(a). See Also, Obligations of Broadcast Licensees Under the Fairness Doctrine, ___F. C. C. 2d ___, 35 F.R. 7820 (1970); In the Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 33 F.C.C. 2d 800 (1972). Applicability of Fairness in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 2d 598, 29 F.R. 10415 (1964).

8/ Judge Wilkey means, of course, that such judgement must devolve from the good faith exercise of reasonable standards by the licensee. See Applicability of Fairness Doctrine, supra, f.n. 8, at par. 10; also see Neckritz v. F.C.C., 446 F. 2d 501 (9th Cir. 1971).

9/ The 1949 Editorializing Report, (supra, f.n. 5, at 1251, 1252) stated:

> In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoints of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request.

There is no way the networks can, at once, comply with those criteria and respond in the negative of the Black Caucus request.

10/ See, e.g., Letter to Nicholas Zapple, 23 F.C.C. 2d 707 (1970). That decision enunciates the so-called "political party corollary" to the equal time provisions of Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. Section 315. The corollary holds, in general, "That when one political party is given time on the media to use at its discretion a request by an opposing party for time cannot be refused." Democratic National Committee et. al. v. F.C.C., supra, f.n. 8, 460 F. 2d at 898. Also see, Committee for Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, (1970 and Republican National Committee, 25 F.C.C. 2d 739 (1970); reversed on other grounds, sub nom., Columbia Broadcasting Co. v. F.C.C. supra, f.n. 8.

FOOTNOTES (Continued)

11/ Ibid.

12/ In view of the fact that I find that the networks acted improperly on both straight public interest and Fairness Doctrine bases, it is unnecessary to opine on the issue of a Congressional access right to the media. Inasmuch as this issue is presently sub judice before the Supreme Court which has gra ed certiorari (405 U.S. 953) in the D. C. Court of Appeals rulin in, sub. nom., Business Executives Move for Peace v. F.C.C., Case No. 24492 (D.C. Cir. Aug. 3, 1971) and will review a finding (specifically, Democratic National Committee, 25 F.C.C. 2d (1970) in which I did not participate, it would appear fruitless to here develop my personal views on this matter for the first time.